(2)

Office - Supreme Court,
FILED
SEP 17 1942

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 367

C. LLOYD NEAL,

Petitioner,

vs.

LYKES BROS. RIPLEY STEAMSHIP CO., INC.,
CLAIMANT SS. DRYDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT LYKES BROS. RIPLEY STEAMSHIP CO., INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

WALTER CARROLL,
BENJAMIN W. YANCEY,
Counsel for Respondent.

INDEX.

Subject Index.

	Page
I. Brief statement of the case	1
II. The case involves only a question of fact which has already been concurrently decided by the two lower courts	3
III. The decision of the lower courts in this case is not in conflict with any decision of this Honorable Court or any decision of any other Circuit Court of Appeals	5

Table of Cases Cited.

American Shipper, The, 70 F. (2d) 632	6
Collie v. *Ferguson*, 281 U. S. 52, 50 Sup. Ct. 189, 74 L. Ed. 696	3
Compania de Navigacion La Flecha v. *Brauer*, 168 U. S. 104, 18 Sup. Ct. 12, 42 L. Ed. 398	4
Conqueror, The, 166 U. S. 111, 17 Sup. Ct. 510, 41 L. Ed. 937	4
Deslions v. *La Compagnie Generale Transatlantique*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973	4
Ella Pierce Thurlow, The, 18 F. (2d) 675	6
Louisville, The, 154 U. S. 657, 14 Sup. Ct. 1190, 25 L. Ed. 771	4
Richmond, The, 103 U. S. 540, 26 L. Ed. 313	4
Sonderborg, The, 52 Sup. Ct. 7	5
Sonderborg, The, 47 F. (2d) 723	5
Swanson v. *Torry*, 25 F. (2d) 835	5
Velma L. Hamlin, The, 40 F. (2d) 852	4

Statute Cited.

Revised Statute 4529, U. S. C. Title 46, Section 596	2, 3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 367

C. LLOYD NEAL,

Petitioner,

vs.

LYKES BROS. RIPLEY STEAMSHIP CO., INC.,
CLAIMANT SS. DRYDEN.

BRIEF OF LYKES BROS. RIPLEY STEAMSHIP CO., INC., RESPONDENT, IN OPPOSITION TO THE PETITION OF C. LLOYD NEAL FOR WRIT OF CERTIORARI.

IF THE COURT PLEASE:

We do not desire to burden the Court with any extensive discussions of the evidence in this case. With the Court's indulgence, we want merely to place before the Court those salient features of the case which we feel should influence the Court to enter a denial of the writ.

I.

Brief Statement of the Case.

Neal, petitioner, was steward of respondent's Steamship DRYDEN on a voyage from Gulf ports to the United King-

dom beginning December, 1937. On the voyage, as found by the District Court and sustained by the Circuit Court of Appeals, Neal proved himself to be completely incompetent for his position, and on complaint of the officers of the vessel to the American Consul at London, and after investigation by the Consulate (R. 81, *et seq.*), Neal was discharged from the service of the vessel and was returned to the United States as a workaway. Neal refused to accept his earned wages up to the time of his discharge, but he has since accepted them, and they form no part of the claim made in this libel. The libel sought to recover his full wages as steward from the date of the discharge to the end of the voyage, and also claimed the penalty provided by Revised Statute 4529, U. S. C. Title 46, Section 596, that is, the penalty of two days' wages for one where the shipowner "refuses" or "neglects" to pay seamen's wages "without sufficient cause".

The District Court held that Neal was actually incompetent to perform the work for which he had signed aboard the vessel, that the Consulate's investigation at London was proper, and that the conclusion reached by the Consulate that Neal was incompetent was sustained by the evidence. However, the District Court held that in that instance the ship's remedy was to demote him to a lower position rather than to discharge him entirely. Accordingly, the District Court reinstated Neal's wages to the end of the voyage and gave a decree for that amount. At the same time the District Court held, in view of the Consulate's approval and the existence of a good faith dispute as to whether the discharge was proper, that the reinstated wages were not withheld "without sufficient cause", and that no penalty could be assessed (R. 240, *et seq.*). The Circuit Court of Appeals affirmed, 127 F. (2d) 879.

Neal having been awarded his wages from the time of the discharge to the end of the voyage, the only question remaining in the case is his right to the penalties provided by Revised Statute 4529, U. S. C. Title 46, Section 596. The pertinent part of this statute reads as follows:

> "Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned *without sufficient cause* shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court * * *." (Emphasis ours.)

Both lower courts have held that under the circumstances of the case the withholding of the wages was *not* without sufficient cause.

II.

The Case Involves Only a Question of Fact Which Has Already Been Concurrently Decided by the Two Lower Courts.

The only question involved in the case at this juncture is, as we have said, the question of whether or not the penalties provided by the statute have accrued. The determination of this question turns on the question of fact, that is, whether or not, the Consulate having sustained the discharge, the failure to pay wages for the period of time after the discharge was without sufficient cause.

As was said by this Court in the case of *Collie* v. *Ferguson*, 281 U. S. 52, 50 Sup. Ct. 189, 74 L. Ed. 696, the words "refuses or neglects to make payment * * * without sufficient cause" connote conduct which is in some sense arbitrary or wilful, and must be taken to embrace something more than a valid defense of the claim for wages. The liability is not incurred where the refusal to pay is

in some reasonable degree morally justified. Similarly, as was said by the Fourth Circuit in *The Velma L. Hamlin*, 40 F. (2d) 852, the statute was not intended to prevent shipowners from contesting in good faith their liability for demands made upon them, or to subject shipowners to ruinous penalties, if, upon a contest in good faith, it should turn out that they were wrong.

As has been said, the action of the master in discharging Neal at London was taken with the full approval of the American Consulate, after the Consulate had conducted an investigation aboard the ship. This approval by the competent legal authority justified the master in believing that he had fulfilled his obligations to Neal. Both courts have held that the right of Neal to wages for the period of time following his discharge by the Consul was the subject of a good faith dispute, and that the penalties of the statute should not accrue.

It is the well settled doctrine in this Honorable Court that in admiralty cases successive concurring decisions by the lower courts on questions of fact are not to be disturbed in this Court, unless clearly shown to be erroneous. *Compania de Navigacion La Flecha* v. *Brauer*, 18 Sup. Ct. 12, 168 U. S. 104, 42 L. Ed. 398; *The Louisville*, 14 Sup. Ct. 1190, 154 U. S. 657, 25 L. Ed. 771; *The Richmond*, 103 U. S. 540, 26 L. Ed. 313; *The Conqueror*, 166 U. S. 111, 17 Sup. Ct. 510, 41 L. Ed. 937; *Deslions* v. *La Compagnie Generale Transatlantique*, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973.

There being nothing in this case except a question of fact on which there are concurring decisions of the two lower courts, which decisions will be shown by a reading of the record to have been well sustained by the evidence, it is submitted that there is no basis for the issuance of the writ.

III.

The Decision of the Lower Courts in This Case Is Not in Conflict With Any Decision of This Honorable Court or Any Decision of Any Other Circuit Court of Appeals.

In the petition herein, pages 2 and 3, the statement is made that the decision of the Circuit Court of Appeals in the present case is in direct conflict with the decisions of this Court and of the Circuit Courts of Appeal in certain named cases. This is a statement with which issue must be taken respectfully but vigorously. The decision of the lower courts in the present case is in complete harmony with the decision of this Court in *Collie* v. *Ferguson, supra*, and that of the Fourth Circuit in *The Velma L. Hamlin, supra.*

The only decision of this Honorable Court cited by the petitioner as being opposed to the decision in the present case is "*The Sonderborg*, 52 Sup. Ct. 7" (petition for certiorari p. 2). There is no such decision by this Court. The reference "52 Sup. Ct. 7" is to a denial of certiorari by this Court in the case of *The Sonderborg*, 47 F. (2d) 723 (4 C. C. A. 1921). In that case, which, as the Court will see, involved facts entirely different from those in the present case, the action of the master could in no reasonable degree be morally justified. There the seamen had been secretly logged, and although they had actually worked and earned wages during the contested period, they found themselves, at the end of the voyage, charged with secret expenses which ate up all or practically all of their actually earned wages. In that instance the Circuit Court of Appeals properly held that the action of the master was arbitrary, unwarranted, and unjust. In the case of *Swanson* v. *Torry*, 25 F. (2d) 835 (4 C. C. A. 1928), the dispute was over *earned* wages, that is, the refusal of the master to pay wages for the

time the seamen had actually worked. There is no such situation here, Neal's actually earned wages having been duly tendered and later accepted. In *The Ella Pierce Thurlow,* 18 F. (2d) 675 (E. D. Va. 1926), as to some of the seamen involved, the penalty was not applicable. As to those three seamen to whom the court granted the penalties, it will be seen that although they were unfit for their work and might have been discharged on that score, they were not so discharged, but in spite of the fact that they were ready and willing to perform their work, the master attempted to have them classed as deserters, a clearly unjustified effort, and here, too, the penalty was properly applied. The last case cited by petitioner is *The American Shipper,* 70 F. (2d) 632 (2 C. C. A. 1934), the citing of which by petitioner is rather incomprehensible because the only question there before the court concerning the statute involved in the present case was whether the penalty provided by that statute was recoverable against the United States as owner of a merchant vessel, the court holding that the double wage provision, being a penalty, could not apply against the United States.

Accordingly, it is submitted that the attempt of petitioner in the present case to obtain the writ on the ground that the decision of the lower courts here is in direct conflict with decisions of this Honorable Court and of Circuit Courts of Appeal is without foundation, and, actually, the holding of the lower courts in the present case is in complete consonance and harmony with the decision of this case in the case of *Collie* v. *Ferguson, supra.*

In the light of the foregoing, it is respectfully suggested that the petition herein should be denied, first, because the question involved is one of fact which has been settled by the concurring decision of the two lower courts, and, second, because the principles of law upon which those

two lower courts proceeded were in complete consonance and harmony with the only prior decision of this Honorable Court.

Respectfully submitted,

WALTER CARROLL,
BENJAMIN W. YANCEY,
Proctors for Respondent.

(2115)